Supreme Court, U.S.
FILED

93 1239 JAN 2 1 1994

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No

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

STANLEY V. TUCKER,

Petitioner

-v-

PACE INVESTMENTS ASSO, ET AL

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE CONNECTICUT SUPREME COURT

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QUESTIONS PRESENTED

1. Can Connecticut state courts grant Res judicata on obsolete decision on due process by Conn. Supreme Court that was never pleaded?

2. Can Conn state courts totally ignore this court's leading decision on Due Process Connecticut v Doher, 115 L Ed 1.

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IN THE

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October Term 1993

STANLEY V. TUCKER,
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-v-

PACE INVESTMENTS ASSO, ET AL
Respondents

Petition for a Writ of Certiorari to the CONNECTICUT SUPREME COURT

Stanley V. Tucker respectfully prays that a writ of certiorari be summarilly granted to review the judgement of the Appellate Court 32 Conn App 384 reprinted in the Appendix A-1 to A-16 The Connecticut Supreme Court denied Certification 11/4/93 and let the decision stand

OPINIONS

The opinion of the Connecticut Supreme Ct is not reported; however the opinion of the Appellate Court is reported 32 Conn App 384.

JURISDICTION

The final decision of the Conn. Supreme Ct was rendered Nov 4, 1993 denied Certification and let the Appellate Court decision stand. No re-hearing was applied for and the jurisd iction of This Court is invoked under 28 USC 1257 (3).

STATUTORY PROVISIONS

5th Amendment -" no person shall be deprived of property without Due Process of law...'

REASONS FOR GRANTING WRIT

The practice of our state trial and Appellate Court is to follow the decisions of Connecticut Supreme Court even when voided by decisions of U. S. Supreme Ct unless and until affirmed by Connecticut SupremeCt. That is precisely what happened in this case. By denying Certification the Connecticut Supreme Ct affirmed its own obsolete law and disregarded Conn v Doher, 115 L Ed 1.

STATEMENT OF THE CASE

Petitioner was owner/builder of 3 brick multi family and owner of 1 two family with construction/permanent financing by same bank then Hartford Federal S & L changed to Northeast Savings. Petitioner paid all mortgages on time for 15 years and paid in full all 2nd mortgages. With 8 years left on the mortgage payments the Bank commenced foreclosure due to a utility receivership and on an unsworn motion without any grounds secured appointment of rent receiver that collected so negligently no taxes nor mortgages paid until he finally quit

Bsnk applied again on same hearsay motion without any grounds while Petitioner objected and moved to appoint himself as rent receiver. Practice Book rules 504-510 only authority adopted by Judges in Violatibn of GS 51-14 which limits rules to rules of practice.

The 2nd receiver again so negligently collected no taxes or mortgages paid and Bank expressed satisfaction when Petitioner protested until values so reduced Bank was able to put through "strict" foreclosure.

The Connecticut Supreme Court wrote a decision upholding the foreclosures and claiming Petitioner had Due Process as long as he had a hearing and ignoring the hearsay. Hartford Federal v Tucker, 196 Conn 174.

Petitioner attempted to vindicate his Due Process rights in federal court but was dimiss ed on grounds of no jurisdiction over state courts. Tucker v Northeast Savings, 675 F Supp 763.

At that time under authority of G.S. 52-592 Petitioner filed this civil action now on appeal alleging Abuse of Process, using rent receivers to create jurisdiction for "strict foreclosure. Motion to Strike denied but Bank "Judge Shopped" until summary judgement granted.

SUBSTANTIAL REASONS FOR SUMMARILLY GRANTING WRIT

I. OBSOLETE LAW CANNOT BE GROUNDS FOR JUDICATA

In this action Appellate Court wrote convoluted decision, see Appendix A1 - A and used a Sua Sponte type of Res Judicata never pleaded in lower court not only to up hold decision in trial court but also to uphold Connecticut Supreme Court in Htfd Federal v Tucker, 196 Conn 172 while at the same time not even mentioning this Court's 1991 enlightened 26 page decision defining Due Process in Connecticut. Conn v Doehr

115 L Ed

Commissioner v Sunnen
333 US at 599
1947

> "That principle (res judicata) is designed to prevent repetitious lawsuits over matters which have once been decided and which have substantially uncha nged static factually and legally It is not meant to create vested rights in decisions that have become obsolete..."

Res Judicata has been rejected where it would frustrate the laws of the U.S.

U.S. v Clark 159 Fed 492 udge Sibley "It is more for the public good that the U.S. should deal honorably... than that a few hours of court time be saved. It (res judicata should not be applied to frustrate its own laws"

In this action res judicata was applied Sua Sponte to uphold the lower court but also to elevate Connecticut SupremeCt decision over that by U.S. Supreme Court!

Yale Law Journal Vol 57 P 348 "The final justification of res judicata the saving of court time is unconvincing. Courts exist for trying lawsuits. If courts are too busy to try cases fairly something is wrong. Decisions on convenience of state approaches theory individual exists for state"

II. CONTINUING RENT RECEIVERS 8 YEARS WITHOUT PAYMENT OF MORTGAGE NOR TAXES ABUSE OF PROCESS

This honorable court had defined at the turn of this century what a receiver should do if he cant pay bills and the message is clear what was done by the bank is Abuse of Process.

Atlantic Trust -v- Chapman 208 US at 377 1907	"If at any time after the appointment has been made it became apparent to the court that it will be unable to pay and discharge the present and future liabilities incurred.... it should refuse to continue operations unless its expenses are guaranteed. No court is bound or ought to continue operatins without the ability to promtly discharge its obligations and unless it can do so it should immediately go out of business....."

Hartford Federal did the exact opposite of these pointed remarks--- it continued to express satisfaction while the mortgage debt unpaid grew larger and larger and exceeded the market value of the neglected properties and jurisdiction created "strict" foreclosure

III. CONN V DOEHR SET NEW DUE PROCESS STANDARDS FOR CONNECTICUT

In 1991 this honorable Court set new due process standards for Connecticut and the United States to follow in its clearly written 26 page decision. Conn v Doehr 115 L Ed 1

Only Conn still follows the state Supreme Ct.

this Court overruled the Conn Supreme Ct in its decision upholding pre-judgment remedies in Conn

Fermont Division v Smith
178 Conn 393

> "GS 52-278e meets state & federal due process constitutions by providing ad equate Judicial supervisions.. require factual affidavit.. provides immediate POSTSEIZURE HEARING..."

This theory was upset by this Honorable Court

Conn v Doehr
Page 11

> "The rule to be derived from Sniadach and its progeny is not that postattachment hearings are generally acceptable providing a judicial officer supervises the process, but prior hearing may be postponed where exceptional circumstances justify such a delay & where added safeguards present. Mitchell v Grant 416 US 600"

The two requirements to clearly emerge are exigent circumstances and sworn meaningful factual testimony

However, the Conn Supreme Ct decided 1985 case on law rejected by This Court

Hartford Federal
-v-
Tucker
196 Conn at 176

Due process does not mandate a particular procedure but rather requires only that certain safeguards exist in whatever procedural form is afforded. See *Fermont Division* v. *Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979), and cases cited therein.

Applying obsolete law this Petitioner would have no rights but applying latest law these Due Process rights affirmed.

CONCLUSION

May this Honorable Court grant the writ and summarilly reverse for re-consideration in light of Conn v Doher, 115 L Ed 1

RESPECTFULLY SUBMITTED

STANLEY V. TUCKER

APPENDIX

No PSC 93 0186 : ORDER-SUPREME CT.

Petition for certification... is ordered denied

11/4/93 s/ Chief Clerk

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32 Conn App 384 : APPELLATE COURT

STANLEY V. TUCKER : STATE OF CONN

-v- : Aug 10, 1993

PACE INVESTMENTS ET AL : DECISION

Action for a declaratory judgment to determine the constitutionality of P.B. 504-510, and for other relief, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the court, Corrigan J., granted defendant's motion to dismiss the first count of the complaint, and the plaintiff appealed to to this court which dismissed the appeal; thereafter plaintiff filed a substitute complaint alleging, inter alia, abuse of process; subsequently, the court, Wagner, J,granted defendants'motion for summary judgment and rendered judgment thereon, from which plaintiff appealed to this court.

Affirmed.

SCAHLLER, J. The plaintiff, Stanley V. Tucker, appeals from the judgment dismissing his civil rights claim against defendants and from summary judgment rendered in favor of of defendants with respect to his claim of abuse of process. The dispositive issue in this appeal is whether the doctrine of res judicata provides basis on which we can affirm trial court's judgment. Because res judicata operates to bar Tucker's civil rights claim and his abuse of process claim, we affirm the judgment of the trial court.

The following facts are not in dispute. The long and tortured history of this case began on 1978 when Northeast Savings (then Hartford Federal Savings & Loan) brought a foreclosure action against Tucker. The foreclosure involved 4 properties located in Hartord. Trial court granted Tucker's motion for a rent receiver. AFter the court rendered judgments of foreclosure on 4 properties, Tucker appealed to Supreme Ct. For reasons unrelated to the present appeal,

the Supreme Court reversed the judgments of foreclosure in Htfd Federal v Tucker, 181 Conn 607, 436 A 2d 1259 (1980)

Northeast Savings, F.A., again sought foreclosure against Tucker alleging nonpayment of the mortgages. Tucker denied nonpayment, pleading special defenses and brought a counter-claim for damages. Subsequently original rent receiver resigned & on Oct 26, 1981 Northeast applied to the court for a replacement. Tucker objected asserting PB ,. 504-510 unconstitutional & void. Tucker further sought appointment of himself as rent receiver. After hearing trial court denied Defendant's motions and on 12/21/81 appointed Plaza Realty as rent receiver. When trial court rendered final judgments of strict foreclosure on all 4 properties Tucker appealed to the Supreme Court.

In Hartford Federal v Tucker, 196 Conn 172, 491 A 2d 1084 cert denied 474 US 920 (1985) (Hartford Federal II) Supreme Court affirmed judgment of trial court. In doing so, court

rejected Tucker's assertion that PB 504 thro 510 are unconstitutional and void, Further, the court was not persuaded that the judgments of strict foreclosure were invalid. Ultimately, Northeast Savings transferred title in properties to defendants, Donna Galluzo and Lorraine Whitehouse. Galluzo & Whitehoue in turn mortgaged properties to Pace Investments Association. Tucker then filed an action in District Court against Northeast Savings, Basine, Galluzo & Whitehouse claiming monetary & declaratory relief pursuant to 42 USC 1983. Tucker v Northeast 675 F Sup 763, appeal dismissed 849 Fed 1468 cert denied 488 US 1007. That That action was predicated on notion PB 504-510 are unconstitution1 both factually and as applied to foreclosurs at issue. Id.USDC dismissed Tucker's action reasoning that "Conn Sup Court determined that application to Tucker of state procedures in foreclosure did not deny him due process of law and that he was given notice and meaningful

opportunity to be heard in appointment of the receiver" Id 767

On April 7, 1989 Tucker brought present action against defendants. Count 1 asserted civil rights claim pursuant to 42 USC 1983. The gravamen of Tucker's claim was PB 504 Through 510 are unconstitutional and void as applied to this case. Count two alleged an action in fraud. On June 2. 1989 defendants filed motion to dismiss count 1 for lack of subject matter jurisdiction. They claimed trial court without jurisdiction to review decision of Appellate Court. Trial Court granted motion and appeal followed. In April 1990 this court dismissed for lack of final judgment. 21 Conn App 821, 576 A 2d 595 (1990)

On May 7, 1990 Tucker filed a substitute complaint through which he replaced his fraud claim in original complaint with action for abuse of process. Tucker alleged defendants abused use of rent receiver. Trial Court struck substitute complaint because

Defendants could not be held liable for conduct of court appointed receiver.
Again Tucker attempted to initiate action for abuse of process and again trial court struck the complaint. On Jan 10, 1991 Tucker filed yet another substitute complaint alleging abuse of process & seeking equitable relief. On Feb 19, 1991 trial court struck claim for equitable relief.
With respect to abuse of process defendants filed answer and raised special defenses statute of limitations & doctrine of res judicata.
On May 31, 1991 defendants moved for summary judgment relying on statute of limitations and res judicata. On January 3, 1992 trial court agreed with defendants that the abuse of process action was time barred and rendered judgment accordingly. In its memo of decision trial court concluded: "It is clear conduct complained ended in June 1986 and plaintiff would have had to assert his claim for abuse of process byJune of 1989. Since it was filed for first time in May 1990 it is time barred

by 3 year limitation period of GS 52-577."
From judgment dismissing his 42 USC 1983 claim and from summary judgment on his abuse of process claim Tucker brought present appeal. Before turning to Tucker's individual claims it is nessessary to understand fully the law of res judicata in Connecticut and its operation. "Res judicata or claim preclusion prevents a claim that has already been decided on merits.." In re John B. 20 Conn App 725, 570 A 2d 237 (1990)quoting Virgo v Lyons 209 Conn 497, 551 A 2d 1243 (1988) "The doctrine of res judicata provides that a former judgment serves as an ab olute bar in a subsequent action involving any claims relating to such cause of action which were actually made or might have been made...."(Citations omitted; internal quotation marks omitted) Dunham v Dunham 221 Conn 384 604 A 2d 347 1992)
The theory of "merger" and "transactional test" steer operation of res judicata. Id 392 n10. Legassey v Shulansky 28 Conn App 653, 611 S2d

930 (1992)Merger reflects fact that "when the plintiff recovers a valid & final personal judgment his original claim is extinguished and his rights upon the judgment are substituted for it. Plaintiff's original claim is said to be merged in judgment. Legassey v Shulansky, supra, quoting 1 Restatement (Second) Judgments S 18 An application of the transactional test defines contours of original claim. Once this claim is ascertained, a court can then assess the preclusive effects of prior judgment. Vakalis v Kagan 18 Conn App 363 "In determining the nature of a cause of action for these purposes, we have long looked to the group of facts which is claimed to have brought about an unlawful injury to pleintiff... and have noted that even though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action..." (Citations omitted; internal quotation marks omitted)Dunham v Dunham,supra. "What factual

grouping constitutes a transaction, and what groupingd constitue a series are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convienient trial unit, and whether their treatment as a unit conforms to parties expectations or business understanding or usage...."(Internal quotation marks omitted) Id 392 n 10

Further, courts must implement res judicata to foster the important public policy of preventing a party from relitigating a matter he has already had an opportunity to litigate Duhaime v American Life 200Conn 360 511 A2d 333 (1986) Res judicata, as a judicial doctrine... should be applied as necessary to promote its underlying purposes. These purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation (2) prevent inconsistent judgments which undermine integrity of judicial system (3) to provide repose

. . . State v Ellis 197 Conn 436, 497 A 2d 974 (1985) Statewide Grievance Committee v Presnick 216 Conn 135, 577 A 2d 1058 (1990) Against this legal backdrop, we turn to Tucker's claims against defendants.

I

THE PLAINTIFF's CIVIL RIGHTS CLAIM

AFter careful reading of our Supreme Court's decision in Federal II, supra, we are satisfied that the doctrine of res judicata bars plaintiff's civil rights claim against defendants. In Hartford Federal II Tucker argued that the process by which the court appointed rent receivers denied his due process of law. The court disagreed, holding (Tucker's) claim. that grant of plaintiff's applications for appointment of rent receivers denied him due process of law is clearly untenable" Id 175-176 The court noted that P.B. 504-510 contained ample procedual safeguards to ensure a party in interest has a meaningful time

for a court hearing and an opportunity to litigate the question of appointment. Id 176

The court further held that "It is clear from the record and from (Tucker's) own admission that he was given notice and a meaningful opportunity to be heard if he had objection to the appointment of a rent receiver" Id 177

Tucker also argued that the rent receiver procedures are unconstitutional because they do not provide a mechanism for the discharge of a rent receiver who is negli gent or committing waste. The court again disagreed for the most part in light of the fact that the receiver must act within the supervision of the appointing judicial authority. Id 178. The court also noted that it was within trial court's discretion to find the rent receiver appointed was better qualified to serve in that capacity than Tucker himself. Id 179/

Through the present civil rights claim, brought 8 years after decision in Federal II

:ker has done no more than echo his assertion that the appointment of rent receivers violated his due process rights. In his complaint, Tucker claims "that Conn P B 504-510 are unconstitutional and void as applied by defendants herein for failure to give notice of defenses before a rent receiver begins to seize plaintiff's rents" The present civil rights action sounds remarkably similarto Tucker's assertion in Federal II.

Tucker's pending challenge to rent receiver provisions arose out of the same transaction or series of connected transactions as did His original constitutional challenge in Federal II namely the appointment of rent receivers. The facts at issue in the present case are related in time, space, origin, and motivation. Further Tucker's pending civil rights action involves claims relating to his claims in Hartford Federal II and any additional matters most certainly could have been raised at that time. We conclude our Supreme Court's disposition of

Tucker's due process claims in Hartford Federal II serves as an absolute bar to the subsequent action at issue.

We recognize the sua sponte nature of our invocation of res judicata. We are equally cognizant of the general rule that res judicata must be specially pleaded. Ziska v Water Pollution Control 195 Conn 682, 687 490 A 2d 509 (1985) Statewide Grievance Committee v Presnick supra 137 n 3. This general rule yields when as here circumstances reveal that a remand "would simply set judicial wheels unnessarily spinning, only to remain at the same end of the road. Chomko v Patmon 20 Conn App 159, 565 A 2d 250 (1989) cf Carnese v Middleton 27 Conn App 530, 537, 608 A 2d 700 (1992) ("the strict application of our rules of practice has yielded to a more common sense application when confronted with the implication of the doctrine of collateral estoppel")

debt and thereby obtain judgments of strict foreclosure. In response defendants raise res judicata and statute of limitations as special defenses and as basis for summary judgment. In granting summary judgment in defendant's favor, the court found the statute of limitations barred Tucker's abuse of process claim. While we agree with the trial court's ultimate judgment we are more concerned with the preclusive effects of res judicata and affirm trial court's judgment on this basis. Henderson v DMV 202 Conn 453,461,521 A 2d 1040 (1987)(this court is authorized to rely upon alternative grounds supported by the record to sustain a judgment) Our analysis regarding the preclusive effect of Hartford Federal II on plaintiff's civil rights claim (part I supra) leads to the same conclusion with respect to the abuse of process claim. It is true Tucker did not specifically raise abuse of process as

In this case, the preclusive effects of res judicata are so patently applicable that a remand to trial court would only lead to the same result we reach here. Moreover, the trial court's dismissal of the civil rights count on Oct 4, 1989 occurred prior to defendant's initiation of their pleadings. Because the court dismissed the count there was no opportunity to answer or plead a special defense. We, therefore, invoke the doctrine of res judicata sua sponte to effectuate the public policy that justifies the doctrine's operation - to promote judicial economy and to avoid inconsistent judgments

II

THE PLAINTIFF's ABUSE OF PROCESS CLAIM

Tucker next challenges trial court's granting of summary judgment with respect to his abuse of Process claim. In this claim, Tucker alleged that defendants abused the rent receiver process to augment his outstanding

a counter claim in the foreclosure action. Nevertheless, Tucker is seeking damages arising from allegations directed to the same transaction or series of transactions invllved in Federal II,i.e., the appointment of rent-receivers.

In Federal II, supra 179, our Sup Ct emphsized the following with respect to the a appointment of rent receivers. "(Tucker) was afforded every opportunity in trial court to persue his complsints concerning receivers of rent. On at least two occasions, (Tucker) was advised that he could not, in his counterclaims, attack plaintiff on the basis of any alleged misconduct on part of court a appointed receiver. The proper course, he was instructed by the court, was either to petition the court for removal oo the rent receiver or to request the court's permission to sue the rent receiver. (Tucker) elected to object to the appointment of a new receiver of rents. The application for the appointment of a new receiver of rents

was addressed to the sound legal discretion of the court, to be exercised with due regard to the rules, and such discretion is not to be disturbed lightly unless abuse of discretion or other material error occur. 2 Swift Digest P 160 (Tucker) alleged that he was better qualified to collect the rents. The plaintiff denied this was true. It was thus a question of fact. The trial court found adversely to (Tucker) in this regard and refused to appoint him as receiver of rents. As we read evidence available to us, we cannot say that this conclusion did not have a reasonable basis in fact. That being so, it was not an unreasonable or arbitrary exercise of discretion which led trial court to appoint Plaza Realth as rent receiver."

We have noted res judicata bars the relitigation of matters "involving any claims relating to such cause of action which were actualy made or which might have been made..." (emphsis added;internal quotes omitted)

Dunham v Dunham, supra, 391-92. It is abundantly clear from the foregoing passage of Hartford Federal II that the facts underlying the appointment of the rent receivers are related to the facts underlying the abuse of process claim in time,space,origin,or motivation, and that the abuse of process count could have been made in that case. The Sup. Ct held the trial court did not abuse its discretion in overruling Tucker's objection to the rent receiver appointment. Tucker cannot now relitigate his objection in the guise of an abuse of process claim.

> "The purpose of a law suit is not only to do substantial justice but to bring an end to controversy. . . "(Citation omitted; internal quotation marks omitted.) Orselet v DeMattero 206 Conn 542, 550, 539 A 2d 95 (1988) The decin Hartford Federal II marked the end of the rent receiver controversy and the end of all matters related to it.

Any additional litigation directed at this matter would unnesessarilly burden our courts and threates the integrity of our judicial system by creating the risk of inconsistent judgments. For these reasons, we conclude that the doctrine of res judicata bars Tucker's civil rights claim and his abuse of process claim.

The judgment is affirmed.

In this opinion the other judges concurred.

(2)

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STANLEY V. TUCKER,
Petitioner,

v.

NORTHEAST SAVINGS, F.A.,
ROBERT R. BASINE, DONNA GALLUZZO,
LORRAINE WHITEHOUSE and PACE INVESTMENT
ASSOCIATES,
Respondents.

On Petition For a Writ of Certiorari To
The Connecticut Supreme Court

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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Printed by
Bruccia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4354

QUESTIONS PRESENTED

1. Whether the Connecticut Appellate Court and the Connectcut Supreme Court decided this case in a way that is in conflict with a decision of this Court.

2. Whether the petitioner's claim under Connecticut v. Doehr is moot.

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Hartford Federal Savings & Loan Association v. Tucker, 196 Conn. 172, 177, cert. denied, 474 U.S. 920 (1985) 2, 8-9, 11-13

Tucker v. Northeast Savings, 675 F. Supp. 763 (D. Conn. 1987), app. dismissed, 849 F.2d 1468 (2d Cir. 1988), cert. denied, 488 U.S. 1007 (1989) 3,4,5

Tucker v. Pace Investment Associates, 32 Conn. App. 384, 629 A.2d 470 (1993), cert. denied, 288 Conn. 906 ___ A.2d ___ (1993) 6, 14

OPINION BELOW

Tucker v. Pace Investment Associates, 32 Conn. App. 384, 629 A.2d 470 (1993), cert. denied, 228 Conn. 906, ___ A.2d ___.

STATEMENT REGARDING CORPORATE OWNERSHIP

Of the five Respondents, only Northeast Savings, F.A. is a corporation. It is a wholly-owned subsidiary of Northeast Federal Corp., the stock of which is publicly traded. Northeast Savings, F.A. has only wholly-owned subsidiaries.

STATEMENT OF THE CASE

This case arose from four foreclosure actions against the petitioner, Stanley Tucker, brought in the Superior Court of Connecticut in 1978 which concluded in favor of Hartford Federal Savings & Loan Association, corporate predecessor of respondent Northeast Savings, F.A. ("Northeast Savings"). Respondent Robert R. Basine, an attorney, represented Northeast Savings in the foreclosure proceedings and in subsequent appeals in state courts. The properties involved were ultimately sold to respondents Donna Galluzzo and Lorraine Whitehouse, who mortgaged them to respondent Pace Investment Associates. During the pendency of the foreclosure actions and subsequent appeals, the Superior Court

appointed two receivers of rents. Tucker was present, was granted a hearing, and voiced his objections at the time of each appointment. For this reason, on appeal the Supreme Court of Connecticut held that the Superior Court's rent receiver rules, embodied in Connecticut Practice Book Sections 504 through 510, had accorded Tucker due process of law and therefore were constitutional both as applied and facially. Hartford Federal Savings & Loan Association v. Tucker, 196 Conn. 172, 177 ("Hartford Federal"). Moreover, as to that ruling, the United States Supreme Court denied certiorari. Hartford Federal Savings & Loan Association v. Tucker, 474 U.S. 920 (1985).

Having exhausted the appellate procedures of both the state and the

federal judiciaries, Tucker filed a lawsuit in the United States District Court for the District of Connecticut under 42 U.S.C. Section 1983, again on the ground that the state court's rent receiver rules unconstitutionally denied him due process of law and, therefore, were unconstitutional both as applied and on their face. That action named as defendants the defendants herein, Pace Investment Associates excepted. The defendants moved to dismiss the action. By Order dated December 15, 1987, Judge Peter C. Dorsey granted the defendants' Motions to Dismiss on the grounds that the District Court lacked subject matter jurisdiction of the appellant's claims and that those claims were res judicata. Tucker v. Northeast

Savings, 675 F. Supp. 763 (D. Conn. 1987).

Tucker appealed Judge Dorsey's ruling to the United States Court of Appeals for the Second Circuit (hereafter, "Second Circuit"). By Order dated May 2, 1988, a three-judge panel granted the respondents' Joint Motion to Dismiss and for Summary Affirmance "substantially for the reasons stated in the Memorandum and Order of Judge Peter C. Dorsey." Tucker v. Northeast Savings, 849 F.2d 1468 (2d Cir. 1988). Tucker's Petition for Rehearing and Suggestion for Rehearing en banc were denied by the Second Circuit's Order dated July 5, 1988. Tucker filed a corrected Petition for a Writ of certiorari in the United States Supreme Court on October 26, 1988, which petition was denied. Tucker v.

Northeast Savings, 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780.

Tucker then filed this action in the Connecticut Superior Court on or about April 7, 1989. The original Complaint re-alleged Tucker's claim for 42 U.S.C. Section 1983 violations as alleged in the United States District Court and added a Second Count based upon common law fraud. Tucker's civil rights count was dismissed by the Court on October 4, 1989, and after a number of versions of his Second Count had been stricken by the Court, a final version, sounding in abuse of process, was answered by the defendants, who then moved for summary judgment on the grounds of statute of limitations and res judicata. On January 4, 1992, the Superior Court granted summary judgment in favor of the defendants.

Tucker then appealed to the Connecticut Appellate Court, which upheld the decision in an Opinion released on August 10, 1993, Tucker v. Pace Investment Associates, 32 Conn. App. 384, 629 A.2d 470 (1993). From that decision, Tucker filed a Petition for Certification to the Connecticut Supreme Court, which petition was denied. Tucker v. Pace Investment Associates, 228 Conn. 906, ____ A.2d ____ (1993). Tucker then filed the present Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

I. Petitioner relies upon Connecticut v. Doehr, which held Connecticut's ex parte pre-judgment remedy statute unconstitutional as violative of due process. This case involves rent receiverships in foreclosure, not attachments to secure a judgment. In Connecticut v. Doehr, this Court distinguished between situations where the subject property bears no relationship to the controversy and where, as here, the plaintiff has a pre-existing interest in it.

II. Because Tucker received the due process safeguards mandated in Connecticut v. Doehr, notice and a hearing, his claim is moot.

III. Tucker's claim that, under Atlantic Trust v. Chapman, the respondent Northeast Savings was obliged to protest the conduct of rent receivers is incorrect. Atlantic Trust does not support that position and is a non-binding precedent in Connecticut.

ARGUMENT

I. The Decision Of The Connecticut Supreme Court Is Consistent With The Decision Of This Court In Connecticut v. Doehr.

In the first portion of his Petition, Tucker argues that the decision of the Connecticut Supreme Court in this case was in error because it asserted as res judicata an earlier decision of the Connecticut Supreme Court, Hartford Federal, which has been rendered "obsolete" by the decision of this Court in Connecticut v. Doehr, __U.S.__,

111 S.Ct. 2105, 115 L.Ed. 2d 1 (1991). That is not so. The Connecticut v. Doehr decision is entirely distinguishable.

To begin with, Connecticut v. Doehr concerned Connecticut's pre-judgment remedy statute which permitted the ex parte attachment of real property as security for a possible future judgment, regardless of whether that property was in any way related to the claim. This case concerns Connecticut's rent receivership rules used during mortgage foreclosures. Under Connecticut law, a receivership is not an attachment. A receivership gives control of the subject property to the court, to be managed by the court on behalf of all parties until the interests of the parties can be finally resolved. Hartford Federal, 196 Conn. at 178.

In Connecticut v. Doehr, this Court made a distinction between cases where the property attached bore no relationship to the controversy, and one where the controversy arose out of a pre-existing interest the plaintiff had in the property. Specifically, the Court referred to Connecticut's mechanic's lien statute, Connecticut v. Doehr, 115 L.Ed.2d at 14, n.4, and vendor's liens in Louisiana, Id. at 16, citing Mitchell v. W.T. Grant, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). In this case, Tucker voluntarily gave an interest in the properties to Northeast Savings, and it was on the basis of protecting that interest that a foreclosure was commenced and a receivership sought.

In the third and final portion of his argument, Tucker tries to tie the facts of his foreclosure to Connecticut v. Doehr by noting that in Hartford Federal the Connecticut Supreme Court cited Fermont Division v. Smith, 178 Conn. 393, 423 A.2d 80 (1979), which was overturned by Connecticut v. Doehr on the issue of the constitutionality of Connecticut's ex parte prejudgment remedy statute, see Connecticut v. Doehr, 115 L.Ed.2d at 12. This argument fails, however, because the Court in Hartford Federal cited Fermont Division v. Smith only for the maxim that "[d]ue process does not mandate a particular procedure but rather requires only that certain safeguards exist in whatever procedural form is afforded." That principle was not challenged by this Court in

Connecticut v. Doehr, wherein it was held: "'[d]ue process unlike some other legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" Connecticut v. Doehr, 115 L.Ed.2d at 13.

II. Tucker's Claim Is Moot Because He Received Notice And A Hearing Before Each Receiver Was Appointed.

Even if the receiverships at issue were to be characterized as attachments and Connecticut v. Doehr was applicable, the issue raised by Tucker is moot.

In addressing the issue of mootness, this Court has held:

> The starting point for analysis is the familiar proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in this case before them." North Carolina v. Rice, 404 U.S. 244, 246 30 L.Ed.2d 413, 92 S.Ct. 402 (1971). The

> inability of the federal judiciary to "review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." Liner v. Jafco, Inc., 375 U.S. 301, 306, n..3, 11 L.Ed.2d 347, 84 S.Ct. 391 (1964); see also Powell v. McCormack, 395 I.S. 486, 496, n.7, 23 L.Ed.2d 491, 89 S.Ct. 1944 (1969); Sibron v. New York, 392 U.S.40, 50, n.8, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968). ... the fact remains that under Art. III "[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." North Carolina v. Rice, supra, at 246, 30 L.Ed.2d 413.

DeFunis v. Odegaard, 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1971). Both receivers in the underlying case were appointed after notice and hearings in which Tucker took part. Hartford Federal, 196 Conn. at 177. Thus, Connecticut v. Doehr's due process

requirements in the context of a pre-judgment attachment, notice and a hearing, were met. Connecticut v. Doehr, 115 L.Ed.2d at 21. A ruling by this Court, on Tucker's present petition, that Tucker was entitled to notice and a hearing would not "affect the rights of the litigants" as notices and hearings were had. Although Tucker alleges in his petition that the Connecticut Appellate Court did not mention Connecticut v. Doehr in its ruling, the Appellate Court did, in fact, consider that case and specifically found that Tucker had the benefit of the due process safeguards it mandates. Tucker v. Pace, 32 Conn. App. at 391, n.2. (Tucker selectively deleted this footnote from his Appendix.)

In addition, to the extent that Tucker believed that the receivers were

guilty of negligence or malfeasance, he was entitled to request leave of the Connecticut Superior Court to sue the receivers, a right of which he availed himself, albeit unsuccessfully, see Hartford Federal Savings & Loan Ass'n v. Tucker, 20 Conn. App. 804, 565 A.2d 557, cert. denied, 213 Conn. 810, 568 A.2d 792 (1989).

III. Tucker's Reliance On Atlantic Trust v. Chapman Is Misplaced.

In the second portion of his argument, Tucker sets out an edited passage from the case of Atlantic Trust v. Chapman, 208 U.S. 360, 28 S. Ct. 406, 52 L. Ed. 528 (1908) to suggest that Northeast Savings had an obligation to protest the conduct of the rent receivers. Atlantic Trust v. Chapman concerned a rent receiver who expended

his own funds to cover receivership expenses, and brought an action to recover his losses when the proceeds of the foreclosure proved insufficient to repay those expenditures. The case does not in any way hold that a foreclosing mortgage holder is liable for the conduct of a court-appointed rent receiver. In addition to being wholly irrelevant, Atlantic Trust v. Chapman is a non-binding precedent in Connecticut, having been decided on general principles of federal common law before this Court's decision in Erie Rail Road v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

CONCLUSION

The instant petition represents Tucker's third attempt to have this Court

grant certiorari on the constitutionality of Connecticut's rent receivership rules arising out of these foreclosures. In this last, desperate effort, filed fully fifteen years after the foreclosures were commenced, Tucker raises no authority applicable to rent receiverships in mortgage foreclosures. Rather, he cites Connecticut v. Doehr, which is inapplicable to his argument and, indeed, holds that Tucker was entitled to exactly those due process safeguards which he received.

This latest petition offers nothing new. The issue of Tucker's due process rights was settled in 1985, and no further debate is needed. For all of the foregoing reasons, Tucker's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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